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No. 90-977

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RPM MANAGEMENT COMPANY, INC. and
RECTOR-PHILLIPS-MORSE, INC. ..... *PETITIONERS*

VS.

ROBERT CHOWNING; JUDITH D. BURROW, Executrix of the Estate of Lawrence B. Burrow, Deceased; WILBUR P. GULLEY, JR.; MARY E. GULLEY; JANET GULLEY WADE; HERSCHEL H. FRIDAY; and HAWTHORNE LAND COMPANY ..... *RESPONDENTS*

Reply to Response to
Petition For Writ Of Certiorari
To The Court Of Appeals Of The State Of Arkansas

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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PARENT COMPANIES OR SUBSIDIARIES OF PETITIONERS

Rector-Phillips-Morse, Inc.
Phillips-Morse Construction Co., Inc.
RPM Mortgage Co., Inc.
RPM Land Sales, Inc.
Birch-Brook, Inc.
RPM Management Co., Inc.

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Respondents argue that Petitioners waited until it was too late to raise the equal protection argument. This is incorrect. The denial of equal protection to which Petitioners' claim is addressed, was the refusal of the Arkansas Court of Appeals to apply Arkansas law and to correct the mistakes that were made by the trial court. The denial of equal protection occurred at the appellate level and Petitioners immediately raised equal protection as an issue in their Request for Rehearing to the Court of Appeals and in their Petition for Review to the Arkansas Supreme Court.

Respondents state that they do not understand the relief Petitioners seek. In case there is any doubt, Petitioners do not seek merely that the Court of Appeals publish its present opinion. Petitioners are constitutionally entitled to a fair hearing; therefore this case should be remanded for rehearing with instructions that the Court publish its rehearing opinion which will therefore require the Arkansas Court to treat all persons alike if the Court intends to change the law.

Respondents argue that this Court should not review the Court of Appeals decision because it is "binding" only on the parties. Respondents cite no authority and do not address Petitioners' argument that state common law "is 'law' within the meaing of the equal protection clause." *In Re: Asbestos Litigation*, 829 F.2d 1233 (3rd Cir. 1987) *cert. denied*, 485 U.S. 1029 (1988). Technically any Court decision binds only those parties in the case in controversy, but as precedent, it also "binds" all others similarly situated. That is the whole thrust of *stare decisis*. Respondents state: "the mere fact that the opinion in this case was not published does not amount to a denial of equal protection and due process." However, the fact that the Arkansas Court reversed Arkansas law and did so in an unpublished opinion is, in fact, a denial of equal protection since the rules of law apply only to the parties in this case and no one else. The unpublished opinion is a means of avoiding *stare decisis*.

Problems associated with unpublished opinions are not new. One recent article touched on several: (1) the decisions may be used to hide embarrassing information regarding the litigants; (2) the decisions may be used to protect attorneys; (3) there is unequal access to the law contained in unpublished opinions; (4) the rules regarding decisions to publish are not uniform from state to state; (5) the decisions may be misused by lawyers and judges; (6) the decisions may be used to send messages to overzealous government agencies; and (7) the decisions may be used as *de facto*

authority. Marcotte, *Unpublished But Influential*, ABA Journal 26 (January 1991).

It has been suggested that inconsistencies develop between a court's published and unpublished decisions—as happened here. Reynolds and Richman, *The Non-precedential Precedent - Limited Publication and No Citation Rules in the United States Court of Appeals*, 78 Colum. L. Rev. 1167 (Oct. 1978). The case at hand is an example of this inconsistency. This Court is now called upon to decide whether it will recognize this unequal application of the law in violation of the equal protection clause of the Fourteenth Amendment.

Petitioners do not allege that the Arkansas Court of Appeals is "corrupt." (Respondent's word). The members of the Arkansas Court of Appeals are human beings, capable of error — even gross error. Reynolds and Richman cite detrimental effects of unpublished opinions on judicial responsibility and judicial accountability as the source of the problems associated with unpublished opinions. Petitioners do not request that this Court eliminate the use of unpublished opinions, but only that this Court assert that gross deviations from the published law in unpublished opinions are not permissible under the Fourteenth Amendment.

> Common-law courts have an obligation to avoid inconsistency by deciding like cases in a like manner. This obligation is imposed to limit judicial discretion and ensure full consideration of all relevant arguments. Thus, a court faced with cases that appear to fall within the same controlling principle must treat those cases similarly or explain in reasoned fashion why it has not done so: either by overruling the prior case, by modifying or limiting its holding, or by distinguishing its facts.

Id. 1200. A court may "use the cloak of nonpublication to avoid the task of reconciling arguably inconsistent

decisions." *Id.* 1200. "Even the best-intentioned and hardest-working court can make a mistake; it is sometimes difficult to appreciate the full significance of an opinion while writing it." *Id.* 1201. It may have been the case that the Arkansas Court did not realize that it was creating law — a problem identified by Reynolds and Richman. *Id.* The court may use unpublished opinions to avoid public disclosure, because of uncertainty, or because "it wishes to decide the case at bar on an impermissible basis — by a rationale that will not necessarily be extended to all like cases." *Id.* That happened in the case at bar.

Unpublished opinions also create problems with judicial accountability. Reynolds and Richman identified two checks on judicial power: (1) a higher appellate court, and (2) "legal consumers." An unpublished opinion is less likely to be reviewed since the higher court is naturally less likely to devote its scarce time to a decision binding only the parties (bad result as opposed to bad law). *Id.* 1203. In fact, Respondents make this argument as a basis for denying this Petition. Unpublished opinions also circumvent the informal check of review by the legal community at large. Because the opinions are unpublished, scholarly evaluation will not be available.

Not publishing the opinion may also decrease the internal accountability that judges feel to themselves, their colleagues, and their office.

> In our law the opinion has in addition a central forward-looking function which reaches far beyond the cause at hand: the opinion has as one if not its major office to show how like cases are properly to be decided in the future. This also frequently casts its shadow before, and affects the deciding of the cause at hand. (If I cannot give a reason I should be willing to stand to, I must shrink from the very result which otherwise seems good.) Thus the opinion serves as a steadying factor which aids reckonability.

Id. 1204 quoting K. Llewellyn, *The Common Law Tradition*, 26 (1960).

The decision by the Arkansas Court of Appeals is a case study of the problems associated with not publishing opinions. The injustice that stems from that decision violates Petitioner's rights of due process and equal protection. Respondents attempt to argue that the fact that the Court of Appeals was not published is insignificant. In fact the nonpublication of the opinion is *very* significant.

Respondents simply conclude that no new legal principles were established by the opinion. However, the opinion: (1) established the new legal precedent that a clear unambiguous 25-year term of a contract is not enforceable upon sale of the property; (2) established the new legal precedent that the contract words "binding upon the successors and assigns" is not enforceable upon sale of the property; (3) overturned 200 years of precedent that the express duration of a contract may not be ignored in light of subsequent changes in circumstances; and (4) established an irrebuttable presumption when testimony refers to what a dead man has, or has not, said. That's a whole lot of new precedent, especially when it is made applicable to Petitioners and no one else.

Respondents argue that this case is similar to the *Park Avenue Investment and Development, Inc. v. Barkheimer, II*, 471 U.S. 1095 (1985). *Park Avenue* is clearly not applicable. First, the equal protection argument in *Park Avenue* was never raised in state courts. Here, Petitioners raised the constitutional argument as soon as they were denied equal protection and due process by the Court of Appeals. The argument was made in a Petition for Rehearing and also in a Petition for Review to the Arkansas Supreme Court.

Second, only conclusory allegations regarding equal protection were made in *Park Avenue*. Petitioners have

shown in detail the law and facts constituting denial of their rights to equal protection and due process. Petitioners have demonstrated specific allegations that the Arkansas courts created an irrebuttable presumption, that state common law is "law within the meaning of the Fourteenth Amendment," and that the Arkansas court clearly failed to follow Arkansas law while issuing an unpublished opinion. The opinion's result deprived Petitioners of a vested property right in the contract.

Third, the facts surrounding this case and the Arkansas case law show the Court of Appeals decision to be very surprising and arbitrary, unlike *Park Avenue.*

Fourth, in *Park Avenue,* the petitioners were the ones from whom recovery was sought. Here, Petitioners seek to recover from Respondents and, therefore, could not possibly possess any dilatory motive.

Although Respondents point to several findings by the trial court, Respondents fail to mention that the trial court also found that Robert Chowning, Herschel Friday and Hawthorne Land Company had ratified the Management Agreement. Another factual problem with Respondents' argument is that the language "binding upon successors and assigns" refers to assignees of the property interest, rather than assignees of the Management Agreement itself. It should also be pointed out that the culpable conduct of which Petitioners are accused was engaged in by Robert Chowning, then an officer, director, and in-house counsel for Petitioners, but who is now a Respondent.

Respondents assert that the Arkansas Statutes are not relevant to this case because the Court found no liability on the part of the Joint Venture. This overlooks the fact that the finding of no liability was based upon the creation of the irrebuttable presumption by the Court, the Court ignoring the parol evidence rule, and the new interpretation of the words of the contract.

Respondents refer to Petitioners' "gall," but display much of it themselves when arguing that attorneys and real estate companies can claim to have been taken advantage of when the specific terms of the Management Agreement are in writing, known by said attorneys and real estate companies, and ratified both by action over the course of ten (10) years and in writing. This is particularly true when one of the attorneys was an officer, director, and in-house counsel of the Petitioners at the time he was supposedly taken advantage of. This is much more than "mere knowledge."

The remedy Petitioners seek if their Petition is granted is remand to the Court of Appeals for an *en banc* hearing and decision in accordance with Arkansas law, and a published rehearing opinion providing a rational basis for its change of the law if such change is appropriate. Obviously Petitioners believe that the Court of Appeals will not make such sweeping changes in Arkansas law if the change applies to everyone. Furthermore, this rehearing will occur free from the pressures of the general election, whereas the opinion which denied Petitioners' constitutional rights was held up for nine months (instead of the normal 36 days) and not rendered until after the general election in which two of the judges involved were candidates.

Respondents have said nothing to rebut Petitioners' argument and cite little authority. The Petition for Writ of Certiorari in this Court should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this 22nd day of January, 1991, made proper service upon all parties in the manner required by Rules 12 and 29 of the Supreme Court of the United States by mailing a copy of the foregoing Reply to Response to Petition for Writ of Certiorari to the counsel of record listed below, first-class United States mail with sufficient postage to insure delivery:

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